SEP 16 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

Estate of KAROLINE E. GUND, Deceased,
W. R. SPRINGATE, Executor, and
IRENE DORNER, Executrix,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 440

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

CLAUDE M. HOUCHINS,
815 Fifteenth Street, N. W.,
Washington, D. C.,
GEORGE R. HUNT,
Security Trust Building,
Lexington, Kentucky,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for writ of certiorari to the United States Circuit Court of Appeals, Sixth Circuit..... 1-5

Question presented 2

Summary statement of the matter involved..... 2

Reasons for granting the writ:

1. The decision of the court below is in conflict with Young Men's Christian Association v. Davis, 264 U. S. 47, and Levey v. Smith, 103 Fed. (2d) 643. 4
2. The decision of the court below is in conflict with Helvering v. Bliss, 293 U. S. 144, and U. S. v. Pleasants, 305 U. S. 357..... 4
3. The decision of the court below is contrary to the opinion of the General Counsel of the Bureau of Internal Revenue, G. C. M. 21610, Cumulative Internal Revenue Bulletin, 1939-2, page 103..... 4
4. The decision of the court below is contrary to the Commissioner's ruling 1256, Internal Revenue Bulletin I-1, page 189..... 5
5. The decision of the court below is contrary to Beattie and Ritchie v. Kurtz, 2 Pet. 566; City of Cincinnati v. Lessee of White, 6 Pet. 431, and Hopkins v. Grimshaw, 165 U. S. 342..... 5
6. The decision of the court below is contrary to public policy 5

Brief in support of petition for writ of certiorari..... 6-13

Opinion below 6

Jurisdiction 6

Statutes and regulations..... 6

Statement of facts 6
Specification of errors 6
Argument 8
Conclusion 11
Appendix 13

CITATIONS.

Cases:

Beattie & Ritchie v. Kurtz, 2 Pet. 566 ..... 5, 11
Bok v. McCaughn, 42 Fed. (2d) 616 11
City of Cincinnati v. Lessee of White, 6 Pet. 431 ..... 5, 11
Helvering v. Bliss, 293 U. S. 144 ..... 4, 10, 11
Hopkins v. Grimshaw, 165 U. S. 342 ..... 5, 11
Levey v. Smith, 103 Fed. (2d) 643 ..... 4, 5, 9, 10, 11
Ould v. Washington Hospital, 95 U. S. 303 11
St. Louis Union Trust Co. v. Burnet, 59 Fed. (2d) 927. 11
Roche's Beach, Inc., 96 Fed. (2d) 776 10
U. S. v. Pleasants, 305 U. S. 357 ..... 4, 5, 10, 11
Young Men's Christian Association v. Davis, 264 U. S. 47 ..... 4, 5, 9, 11

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended, Section 303 (U. S. C., Title 26, Sec. 412) 2, 3, 8, 13

Treasury Department Rulings:

G. C. M. 21610, 1939-2 C. B. 103 ..... 4, 10
I. T. 1256, I-1 C. B. 189 ..... 5, 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

Estate of KAROLINE E. GUND, Deceased,
W. R. SPRINGATE, Executor, and
IRENE DORNER, Executrix,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

The Estate of Karoline E. Gund, deceased; W. R. Springate, Executor, and Irene Dorner, Executrix, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered in the above case on June 27, 1940 (R. 41-47), affirming the judgment of the United States Board of Tax Appeals, 37 B. T. A. 1335 (R. 31-33).

QUESTION PRESENTED.

The petitioner bequeathed the remainder of her estate to a cemetery association organized and operated solely to acquire and perpetually care for the cemetery, to be held by it as a fund for the maintenance, care, additions and betterments to said cemetery. Is the bequest for a public, religious or charitable use within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, as amended (Appendix, p. 13), and deductible thereunder?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The evidence in the case, submitted in written stipulation (R. 14-30), may be summarized as follows:

Karoline E. Gund died testate August 21, 1934 (R. 14), and bequeathed the residue of her estate in trust, the income to be paid to Irene Dorner for life. Thereafter, the corpus to Oak Grove Cemetery Association (called in the will "La Crosse Cemetery Company") to be held as a fund for the maintenance, care, additions and betterments to the cemetery as provided in paragraph 6 of her will (R. 18), which reads as follows:

> "6. All the rest, residue, and remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my Trustees hereinafter named, in trust, however, for the uses and purposes following:
>
> "(a) To hold such securities and property as remains and pay the entire net income therefrom to Miss Irene Dorner, in such amounts and at such times as she may direct.
>
> "(b) At the death of Miss Irene Dorner, I give, devise and bequeath the property and securities held

under Paragraph 6, Section 'A', to the La Crosse Cemetery Company, La Crosse, Wisconsin, to be held by said cemetery company as a fund for the maintenance, care, additions and betterments to said cemetery."

The value of the residue, after deducting the life estate, was $101,105.68 (R. 15). The Oak Grove Cemetery Association was incorporated in perpetuity on December 2, 1872 under Chapter 67 of the Wisconsin Statutes of 1858, which, as amended, is now found in Chapter 157 of the Wisconsin Statutes of 1933. It has no stockholders. It is managed by trustees and officers. The trustees elect the officers and the trustees are elected by the owners of the burial rights. It owns a cemetery of about 103 acres in the City of La Crosse, Wisconsin, which is held and used exclusively for burial purposes. It sells burial rights to the public generally. The county, city, churches and other organizations own plots in the cemetery for the burial of their respective indigent subjects, and the county also gives free burial rights to United States soldiers. Its entire income is restricted to and used exclusively for the acquisition, operation, maintenance and care of the cemetery and any excess funds must be set aside in a perpetual care fund. It collects from owners of burial rights an annual charge of 1 cent per foot towards defraying the cost of maintenance and upkeep. The decedent and her husband are buried in a private mausoleum erected in said cemetery with private funds (R. 15-16).

REASONS FOR GRANTING THE WRIT.

The decision of the court below is contrary to Section 303 (a) (3) of the Revenue Act of 1926, as amended. The decision of the court below, holding that the bequest was not to a charitable use on the grounds the cemetery association provided no free burial space and charged not less than the fair value for burial rights and upkeep, is con-

trary to the plain provisions of the above section of the Revenue Act, providing for the deduction of bequests to a trustee or trustees for charitable purposes.

The decision of the court below is in conflict with the decision of this Court in Young Men's Christion Association v. Davis, 264 U. S. 47, and the decision of the Seventh Circuit in Levey v. Smith, 103 Fed. (2d) 643. The decision of the court below, sustaining the disallowance of the deduction of the bequest on the basis of the scope and nature of the business of the legatee (the cemetery association), instead of the use of the legacy as willed by the testator, is in conflict with the decisions of this Court in Young Men's Christian Association v. Davis, supra, and Levey v. Smith, supra (pp. 9-10, infra), holding that the right to the deduction is governed by the use of the bequest specified in the will of the testator.

The decision of the court below is in conflict with the decisions of this Court in Helvering v. Bliss, 293 U. S. 144, and U. S. v. Pleasants, 305 U. S. 357. Under Section 303 (a) (3) of the Revenue Act of 1926, as amended, the bequest is exempted on the grounds it is a gift for a public, religious or charitable use. Young Men's Christian Association v. Davis, 264 U. S. 47. The court below, in following Schuster v. Nichols, 20 Fed. (2d) 179, holding that the word "charitable" should be given a narrow meaning under the rule of strict construction, is contrary to and in conflict with the decisions of this court in Helvering v. Bliss, supra, and U. S. v. Pleasants, supra, holding that exemptions from tax were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed.

The decision of the court below is contrary to the opinion of the General Counsel of the Bureau of Internal Revenue, G. C. M. 21610, Cumulative Internal Revenue Bulletin, 1939-2, page 103. The disallowance of the deduction of the

bequest on the grounds the cemetery association was not organized and operated for exclusively charitable purposes is contrary to the above opinions of the General Counsel of the Bureau of Internal Revenue, holding that the use specified in the will or other binding instrument governed and that the trustee or legatee did not have to be organized and operated for exclusively charitable purposes.

The decision of the court below is contrary to Ruling 1256, Internal Revenue Cumulative Bulletin, I-1, page 189, holding that a gift to a cemetery association organized solely to lease, operate and care for a cemetery owned by a city was for the use of a political subdivision of a state for a public purpose.

The decision of the court below is contrary to Beattie and Ritchie v. Kurtz, 2 Pet. 566; City of Cincinnati v. Lessee of White, 6 Pet. 431, and Hopkins v. Grimshaw, 165 U. S. 342, holding that the gift of land for cemetery purposes is a dedication thereof to a public, pious and charitable use.

The decision of the court below is contrary to public policy. The exemption from tax of bequests for altruistic purposes is from motives of public policy and must be liberally construed (Helvering v. Bliss, supra; U. S. v. Pleasants, supra), and are encouraged by both the courts and Congress (Young Men's Christian Association v. Davis, supra; Levey v. Smith, supra).

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

CLAUDE M. HOUCHINS,
815 Fifteenth Street, N. W.,
Washington, D. C.,
GEORGE R. HUNT,
Security Trust Building,
Lexington, Kentucky,
Counsel for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION BELOW.

The opinion and decree of the Circuit Court of Appeals, Sixth Circuit (R. 41), was entered June 27, 1940, and the mandate issued July 29, 1940 (R. 49), affirming the decision of the United States Board of Tax Appeals, 37 B. T. A. 1335 (R. 31-32).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statutes and regulations are set forth in the appendix, infra, p. 13.

STATEMENT.

The essential facts are stated in the foregoing petition for certiorari (pp. 2-3, supra) and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence will be made in the course of the argument.

SPECIFICATION OF ERRORS.

The court below erred:

1. In disregarding the plain provisions of Section 303 (a) (3) of the Revenue Act of 1926, as amended, by failing to give the ordinary meaning thereto.

2. By holding that the nature and scope of the business of the legatee governed instead of the use of the legacy as willed by the testator.

3. By applying the rule of narrow construction instead of the rule of liberal construction.

4. In holding that the deduction of the bequest depended upon the cemetery association being organized and operated exclusively for charitable purposes.

5. It is in conflict with and contrary to the applicable decisions of this court, the Circuit Courts of Appeal and the Bureau rulings.

6. It is contrary to public policy.

ARGUMENT.

The bequest was to trustees for the life of Irene Dorner, then to the cemetery association, to be held by it as a fund for the upkeep of and additions and betterments to the cemetery. The stipulated value of the bequest to the cemetery association is involved and was deducted in the estate tax return and disallowed by the Commissioner of Internal Revenue. The disallowance thereof was affirmed by the Board of Tax Appeals and the court below.

The Commissioner, the Board of Tax Appeals and the court below failed to recognize that the terms of the will of the testator specifically restricting the use of the bequest to additions to and upkeep of the cemetery (R. 18) governed, and not the scope and nature of the business of the cemetery association (R. 43).

The court below erred (1) in disregarding the plain language of Section 303 (a) (3) of the Revenue Act of 1926, as amended, providing for the deduction of bequests to trustees to be used for charitable purposes; (2) in disregarding the applicable decisions of this court, other circuit courts, and rulings of the Commissioner, holding that the use specified in the will of the testator governed the right to the deduction of the bequest, that exemption provisions are to be construed liberally in the taxpayer's favor; (3) in disregarding the decision of this court holding that the gift of land for cemetery purposes was a dedication to public, pious and charitable use.

The plain purport of Section 303 (a) (3) of the Revenue Act of 1926, as amended, is to allow the deduction of bequests for public, religious, or charitable purposes. At least three tests are prescribed: (1) if the bequest is to a municipality the test is whether it is to be used for a public purpose; (2) if to a corporation or association, uncon-

ditionally, for general business purposes, the test is whether such corporation or association is organized and operated for religious or charitable purposes; (3) if the use is specified and controlled by the terms of the will of the testator, the test is whether such specified use is religious or charitable, and the nature of the general business of the legatee or trustee has no application or bearing. The court below and the Board of Tax Appeals erroneously applied (2) above. (3) above applies for the reason that under the terms of the will the Oak Grove Cemetery Association was bound to use the bequest for the upkeep of the cemetery and additions thereto.

The court below admits that a cemetery association could be so organized and operated as to be a charitable organization within the meaning of the Revenue Act, but disallows the deduction of the bequest on the grounds that the cemetery association was not organized and operated for exclusively charitable purposes because it did not give free burial rights and made charges for upkeep. That is contrary to the plain language of the above section 303 (a) (3), and the fact that the entire services, properties and income of the cemetery association were devoted to additions and betterments to and upkeep of the cemetery, and that through the county, city, churches and other organizations, free burial rights were given to the poor. The aforesaid section 303 was founded on the policy of encouraging the generosity of donors to charitable and altruistic objects. If the bequest had been to a bank or trust company specifically for the upkeep of the cemetery, one would scarcely contend that it was not for a charitable use.

The decision of the court below is in conflict with Young Men's Christian Association v. Davis, 264 U. S. 47, and Levey v. Smith, 103 Fed. (2d) 643 (C. C. A. 7), holding as follows:

"The right to a deduction depends upon what a testator has willed respecting the use of a legacy and not upon the use which a legatee is willing to make of it. It is the theory of the estate tax statute that the entire estate interest which passes at death is to be used as the basis of the estate tax except to the extent that the law allows deductions. The statute gives to a testator the power to reduce the interest which will be subject to the estate tax. In Young Men's Christian Assn. v. Davis, the Supreme Court stated the thought thus (264 U. S. 47, 50, 44 S. Ct. 291, 292, 68 L. Ed. 558):

" 'Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts, but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him, "If you will make such gifts, we will reduce your death duties and measure them, not by your whole estate, but by that amount, less what you give." ' "

It is contrary to the rule laid down in Helvering v. Bliss, 293 U. S. 144; U. S. v. Pleasants, 305 U. S. 357, and Roche's Beach, Inc., 96 Fed. (2d) 776, holding that exemption of gifts for altruistic purposes are begotten from motives of public policy, and are to be liberally construed in favor of the taxpayer.

It is contrary to the opinion of the General Counsel of the Bureau of Internal Revenue, No. 21,610, Internal Revenue Cumulative Bulletin, 1939-2, page 103, holding that the use specified in the will of the testator or other binding instrument governed, irrespective of whether the legatee was organized and operated for exclusively charitable purposes.

It is contrary to the ruling of the Commissioner of In-

ternal Revenue, I. T. 1256, Internal Revenue Cumulative Bulletin I-1, page 189, holding that a gift to a cemetery association, organized solely to lease and care for a cemetery owned by a city was for an exclusively public purpose.

It is contrary to Beattie and Ritchie v. Kurtz, 2 Pet. 566; City of Cincinnati v. Lessee of White, 6 Pet. 431, and Hopkins v. Grimshaw, 165 U. S. 342, holding that a gift for cemetery purposes is a dedication to a public, pious and charitable use. These decisions are within the judicial construction of a charity in Ould v. Washington Hospital, 95 U. S. 303; Bok v. McCaughn, 42 Fed. (2d) 616, and St. Louis Union Trust Co. v. Burnet, 59 Fed. (2d) 927, and also within the principles upon which is founded U. S. Code, Title 24, Sections 271-295, providing for the acquisition and upkeep of our national cemeteries with public funds.

The decision of the court below is contrary to public policy. Bequests for altruistic objects are encouraged by both the courts and by Congress (Young Men's Christian Association v. Davis, supra; Levey v. Smith, supra). Exemption of such bequests or gifts from taxation, either specifically or by deduction, is from motives of public policy (Helvering v. Bliss, supra, and U. S. v. Pleasants, supra).

CONCLUSION.

The decision of the court below involves the construction of a federal statute, and is so erroneous as to constitute a departure from the usual and accepted course of judicial procedure, and calls for an exercise of this court's power of supervision. It is contrary to the statute, decisions of this court, other Circuit Courts of Appeal, and rulings of the Bureau of Internal Revenue. The issue concerns a gift for

the benefit of the public. The question is of public importance. The petition should be granted.

Respectfully submitted,

CLAUDE M. HOUCHINS,
815 Fifteenth Street, N. W.,
Washington, D. C.,
GEORGE R. HUNT,
Security Trust Building,
Lexington, Kentucky,
Counsel for Petitioners.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended:

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) [as amended by Section 403 (a) of the Revenue Act of 1934]. In the case of a citizen or resident of the United States, by deducting from the value of the gross estate * * *.

"(3) (as amended by Section 807 of the Revenue Act of 1932 and by Section 406 of the Revenue Act of 1934). The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * *"

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Beatty v. *Kurtz*, 2 Pet. 566	5
City of Cincinnati v. *The Lessee of White*, 6 Pet. 431	5
Craig v. *Commissioner*, 11 B. T. A. 193	4
Helvering v. *Bliss*, 293 U. S. 144	5
Hopkins v. *Grimshaw*, 165 U. S. 342	5
Levey v. *Smith*, 103 F. (2d) 643	5
Schuster v. *Nichols*, 20 F. (2d) 179	4
United States v. *Pleasants*, 305 U. S. 357	5
Wilbur Nat. Bank, Executor v. *Commissioner*, 17 B. T. A. 654	4
Y. M. C. A. v. *Davis*, 264 U. S. 47	4
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9: Sec. 303, as amended (U. S. C., Title 26, Sec. 412)	7
Revenue Act of 1932, c. 209, 47 Stat. 169: Sec. 103	4
Revenue Act of 1934, c. 277, 48 Stat. 680: Sec. 101 (U. S. C., Title 26, Sec. 103)	4
Revenue Act of 1936, c. 690, 49 Stat. 1648: Sec. 101	4
Miscellaneous:	
G. C. M. 21610, 1939–2 Cum. Bull. 103	5
I. T. 1256, I–1 Cum. Bull. 189	5
Treasury Regulations 80 (1937 ed.):	
Art. 44	8
Art. 45	10

265615—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 440

ESTATE OF KAROLINE E. GUND, DECEASED, W. R. SPRINGATE, EXECUTOR, AND IRENE DORNER, EXECUTRIX, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 31–32) is unreported. The opinion of the Circuit Court of Appeals (R. 42–47) is reported in 113 F. (2d) 61.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1940 (R. 41). The petition for a writ of certiorari was filed September 16, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Oak Grove Cemetery Association (of La Crosse, Wisconsin) is a corporation organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. 7–10.

STATEMENT

The facts, as stipulated (R. 14–30) and found by the Board of Tax Appeals (R. 31), may be summarized as follows:

Karoline E. Gund, the decedent, died testate on August 21, 1934. She bequeathed the residue of her estate in trust to pay the income to Irene Dorner for life. Thereafter, the corpus was to be paid to Oak Grove Cemetery Association (called in the will "La Crosse Cemetery Company") to be held as a fund for the maintenance and care of the cemetery. (R. 15, 31.)

The Oak Grove Cemetery Association is a Wisconsin corporation, incorporated in perpetuity on December 2, 1872, under Chapter 67 of the Wisconsin statutes of 1858. It has no stockholders. It is managed by trustees and officers. The trustees elect the officers and the trustees are elected by the owners of burial rights. The corporation owns a cemetery in La Crosse, Wisconsin, which is

held and used exclusively for burial purposes. It sells burial rights to the public generally, to the county and city, to churches, and to other organizations. The entire income of the corporation must be used exclusively for the acquisition, operation, maintenance, and care of the cemetery, and any excess is set aside as a perpetual care fund. The decedent and her husband are buried in the cemetery. (R. 15–16, 31.)

The Commissioner disallowed as a deduction from the gross estate the agreed value of the remainder interest left to the cemetery and determined a deficiency (R. 16, 31).

Upon review, the Board of Tax Appeals sustained the action of the Commissioner (R. 32); and the Circuit Court of Appeals affirmed (R. 47).

ARGUMENT

1. The record in this case indicates, as the Circuit Court of Appeals observed (R. 43), that no free burial space is ever provided by the Oak Grove Cemetery Association and that nothing less than fair value is ever charged for burial rights or upkeep. Accordingly, on these facts, the Association cannot be regarded as a corporation organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3). And, by the same token, the bequest to the Association, even if it be regarded as a trustee,[1] cannot be

[1] The Circuit Court of Appeals found (R. 47) that there was no necessity for deciding whether the Association held the bequest as trustee.

thought as intended to be used exclusively for charitable purposes. *Wilbur Nat. Bank, Executor* v. *Commissioner,* 17 B. T. A. 654. Accord: *Schuster* v. *Nichols,* 20 F. (2d) 179 (D. Mass.); *Craig* v. *Commissioner,* 11 B. T. A. 193, 200. The term "charitable," in Section 303 (a) (3), clearly was used in the sense of eleemosynary. *Schuster* v. *Nichols, supra,* at 181. This view is supported by the consideration that charitable organizations and cemeteries are classified separately under the Revenue Acts, and the intention to treat them similarly for certain tax purposes has always been evidenced with meticulous exactness by specific provisions, never by classifying them both as charities. See, *e. g.,* Section 103 of the Revenue Act of 1932, c. 209, 47 Stat. 169; Section 101 of the Revenue Acts of 1934 and 1936, c. 277, 48 Stat. 680, and c. 690, 49 Stat. 1648, respectively, relating to income tax exemptions. Plainly, therefore, an equally specific provision would have been made for cemetery associations had Congress had them in mind when it enacted Section 303 (a) (3).

2. None of the various cases and authorities cited by petitioner (Pet. 3–5), in an attempt to show a conflict, are concerned in any way with the question presented here.

In *Y. M. C. A.* v. *Davis,* 264 U. S. 47, this Court held merely that the Estate Tax does not exempt recipients of charitable gifts from the burden of the tax where the will places such burden upon them and that the tax, accordingly, may be charged

against the gross estate and specific bequests satisfied in full prior to satisfying residuary charitable gifts. *Helvering* v. *Bliss,* 293 U. S. 144, and *United States* v. *Pleasants,* 305 U. S. 357, were concerned only with the extent of the base for computing the 15 percent deduction from income allowable for charitable contributions. *Beatty* v. *Kurtz,* 2 Pet. 566, and *City of Cincinnati* v. *The Lessee of White,* 6 Pet. 431, raised questions concerning the formalities necessary to effectuate a dedication of land for public or pious uses. These cases, obviously, have no bearing upon the issue raised in the case at bar.

Levey v. *Smith,* 103 F. (2d) 643 (C. C. A. 7th), held that a deduction from gross income is not allowable where the testator does not require that the bequest be used exclusively for religious or charitable purposes. No question with respect to cemetery associations was presented or discussed. *Hopkins* v. *Grimshaw,* 165 U. S. 342, 352–353, held simply that a resulting trust in favor of the grantor and his heirs arose when land transferred to trustees, for the use of a particular society as a burial ground, ceased to be used for the purpose specified in the grant. G. C. M. 21610, 1939–2 Cum. Bull. 103, dealing with income-tax exemptions, declared that the purposes of an organization should be determined from the instrument creating it or from other binding instruments. The question which is pivotal to this case was not discussed. And I. T. 1256, I–1 Cum. Bull. 189, held that a gift for the use of a cemetery *owned by a city* was made

for the use of a political subdivision of a state and hence deductible under Section 214 (a) (11) of the Revenue Act of 1921. Plainly, therefore, there is no conflict.

The pivotal question in this case is whether cemetery associations which never give free burial space or charge less than fair value for burial rights and upkeep should be regarded as organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3). The decision of the Circuit Court of Appeals is based upon an established practice expressed in the Revenue Acts to classify cemetery associations separately from charitable organizations and to provide for them specifically wherever similar treatment is intended. No conflict on this point exists.

CONCLUSION

The decision of the court below is correct and in accordance with established practice expressed in the Revenue Acts. There is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

EDWIN E. HUDDLESON, JR.,
Attorney.

OCTOBER, 1940.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended:

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) [as amended by Section 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680] In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * *

(3) [as amended by Section 807 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 406 of the Revenue Act of 1934] The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, ex-

clusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. If the tax imposed by section 301, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph, shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; and

* * * * *

[U. S. C., Title 26, Sec. 412.]

Treasury Regulations 80 (1937 ed.):

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (including the encouragement of art and the prevention of cruelty to children or ani-

mals), if no part of the net earnings of the corporation or association inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, if such transfers, legacies, bequests, or devises are to be used by such trustee, trustees, fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Article 10 indicates the principles to be applied in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to a charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of article 10. If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of

article 10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principles set forth in article 10, by one skilled in actuarial computations.

* * * * *

ART. 45. *Religious, charitable, scientific, and educational corporations.*—A corporation or association to which such a transfer was made must meet four tests: (1) It must be organized and operated for one or more of the specified purposes; (2) it must be organized and operated exclusively for such purpose or purposes; (3) no part of its net earnings shall inure to the benefit of private stockholders or individuals; and (4) no substantial part of its activities shall be carrying on propaganda, or otherwise attempting, to influence legislation.

The estate is not deprived of the right to deduct the value of property so transferred by reason of the fact that private individuals are the recipients of the benefits which the corporation or association dispenses. Such right is, however, lost if any part of the net earnings of the corporation or association inures to the benefit of a private stockholder or individual.

U. S. GOVERNMENT PRINTING OFFICE: 1948